No. 80-1149

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE MARTIN, *et al.*,

Petitioners,

vs.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

and

CARRIE L. GRAVES, *et al.*,

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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Questions Presented

1. Whether as one of their discretionary powers, school authorities may attempt as a matter of educational policy to maintain a desegregated school system by using race as a factor in making pupil assignments.

2. Whether the 1974 court approved school desegregation plan for the Charlotte-Mecklenburg Schools was implemented and a unitary system achieved.

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On Petition for a Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Plaintiffs, petitioners here, a group of parents and children, brought suit against the Charlotte-Mecklenburg, North Carolina, Board of

Education seeking an order prohibiting the Board from assigning pupils pursuant to the Board's 1978 pupil assignment plan. Under that plan, out of approximately 78,000 children in the system, 2,050 white and 2,775 black children were reassigned. One reason for many of those transfers was to prevent re-segregation of certain schools. Plaintiffs contend that with the adoption and alleged implementation of the 1974 pupil assignment plan, it was impermissible thereafter for the Board to consider the race of students in making such assignments.

Carrie Graves and others were allowed to intervene as defendants on their own behalf and on behalf of a class of black pupils attending or eligible to attend the Charlotte-Mecklenburg schools. They are represented by the attorneys who represented Swann and the other plaintiffs in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S 1 1971).

Defendant Board and intervenors argued, and the district court subsequently found that the pupil assignment plan under attack was adopted pursuant to prior orders of the district court affirmed by this Court's decision in Swann and

orders later based upon that decision, and in accordance with independent policy decisions by the School Board itself that it would maintain and operate a desegregated school system.

This is the third suit filed by the same lawyers seeking to nullify Swann.[1/] Plaintiffs in the instant case pleaded in their individual capacities; they did not claim to represent a class and did not seek to be certified as representatives of a class. S.A. 121. At the time of the evidentiary hearing no plaintiffs testified, and no live evidence was offered in their behalf. Indeed the district court noted that plaintiffs merely offered and relied upon a few written exhibits and admissions from the pleadings. S.A. 8-9. While conceding, hypothetically that other

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1/ The district court indicated in its opinion that the two prior cases, Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47 (1971), and Cuthbertson v. Charlotte-Mecklenburg Board of Education, 535 F.2d 1249 (4th Cir. 1976) cert. den. 429 U.S. 831 (1976), involved much the same factual contentions as made in the instant case, and were dismissed after adverse decisions. S.A. 6-7. References to "A." are to the Appendix; to "S.A." to the Separate Appendix.

persons might be able to show that racial considerations played a substantial role in their reassignment under the 1978-79 pupil assignment plan, the district court found, in fact that plaintiffs produced no evidence whatever of any injury or harm to themselves from the Board's actions. S.A. 121, 122.

In contract to the proffer of plaintiffs, defendant School Board and intervenors offered exhibits and lengthy testimony. Based on such evidence and a reexamination of the prior findings of fact and orders in Swann, the district court found that there had been no prior complete implementation of a judicial remedy relating to pupil assignment, and upheld the 1978 pupil assignment plan.[2/]

I so holding, the district court found with respect to implementation of its prior orders on pupil assignment that (1) construction, location and closing of school buildings continued to

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2/ Petitioners have suggested incorrectly that Swann was dismissed in July 1975. See 67 F.R.D. 648 (W.D. N.C. 1975).

promote segregation; (2) placement of kindergarten and elementary school grades remained discriminatory and unfair to the smallest black children; (3) failure to monitor the thousands of pupil transfers each year in the context of the "Feeder Plan" and long standing housing segregation tended to promote segregation in the schools; and (4) discriminatory burdens of desegregation remained upon the black children. The district court further found that these continuing problems were within the substantial if not exclusive control of the School Board.

On the basis of these findings the district court held inapplicable the decision in Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976), because the first essential element of a claim under Pasadena - prior complete implementation of a judicial remedy relating to pupil assignment - was obviously not present. The district court noted that Pasadena is by its own terms inapplicable to plans "embodying specific revisions of the attendance zones for particular schools, as well as provisions for later appraisal of whether such discrete individual modifications

had achieved the unitary sytem required by Brown v. Board of Education," Pasadena, supra 427 U.S. at 435. S.A. 98. The 1974 plan, the court found, upon which petitioners founded their argument that compliance had been achieved, specifically called for the later appraisal and modifications which were made in 1978.

As an alternative basis for upholding the School Board's 1978 plan, the district court found that the Board's action was based on its independent commitment as a matter of public policy to maintain a desegregated school system without regard to court intervention. S.A. 105-10; 116-17. In upholding the 1978 plan on this basis, the district court relied upon this Court's earlier decision in Swann in which such a policy was approved:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities . . . . " 402 U.S. at 16, 91 S. Ct. at 1276.

In affirming the decision of the district court, the Fourth Circuit, rested its decision solely on the latter ground, that Pasadena was inapplicale because the School Board "is vested with broad discretionary powers over educational policy and is well within its powers when it decides that as a matter of policy schools should not have a majority of minority students. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S at 16." 5a. The Fourth Circuit did not consider the district court's holding that implementation of the 1974 and other plans had not yet been achieved.

REASONS FOR DENYING THE WRIT

The Lower Court Decisions Do Not Conflict With The Decisions Of Other Circuits Or Of This Court

Petitioners' reliance on Pasadena is entirely misplaced, as the district court's careful analysis of this issue makes clear. See S.A. 8-18. There the plaintiff was the local school board itself seeking relief from a district court order

requiring further rearrangements of attendance zones after having fully complied with orders providing remedies for previous racially discriminatory attendance patterns. In the instant case, however, previous racially discriminatory attendance patterns have never been remedied, and a unitary system achieved. As the meticulous and detailed analysis of the district court shows, this achievement has been foreclosed by persisting problems of construction, location and closing of school buildings which continue to promote segregation; by placement of kindergarten and elementary school grades in ways that remain discriminatory and unfair to the smallest black children; by failure of the Board to monitor and control pupil transfers, thereby tending to promote segregation in the schools; and by continuing to place a discriminatory burden of desegregation on black children. S.A. 38-115. There was thus no basis in Pasadena on which to argue that a unitary system had been achieved. See, Booker v. Special School District No. 1, 585 F.2d 343, 357 (8th Cir. 1978); Lee v. Tuscaloosa City School System, 576 F.2d 37, 38 (5th Cir.

1978); Haycraft v. Board of Education of Jefferson County, Kentucky, 560 F.2d 755 (5th Cir. 1977).

But apart from the issue of whether compliance was ever achieved with the district court's prior orders on pupil assignment, this case is different from Pasadena because the School Board has independently formulated and sought to implement through the 1978 pupil assignment plan a policy to maintain an integrated school system. As indicated, supra, such a policy was expressly approved by this Court in Swann and other cases.

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorites . . . ." 402 U.S. at 16.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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